CLERK'S COPY.

No appearance for respondent

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

vs.

E. W. THOMPSON

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, LOS ANGELES COUNTY, STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JANUARY 8, 1941.

CERTIORARI GRANTED FEBRUARY 17, 1941.

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SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

vs.

E. W. THOMPSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

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[fol. 1]

IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

E. W. THOMPSON, Defendant

COMPLAINT—Filed August 28, 1939

Personally appeared before me, this 28th day of August, 1939, Mrs. George Farley of Los Angeles City, who, first being duly sworn, complains and says: That on or about the 22nd day of July, 1939, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Sec. 3, of Chap. 390 of the Statutes of 1933, was committed by E. W. Thompson (Whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully engage in the business and act in the capacity of a motor transportation agent without then and there having a license from the Railroad Commission of the State of California so to do.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant (whose true name to affiant is unknown) and that he may be dealt with according to law.

[fol. 2] Mrs. George Farley.

Subscribed and sworn to before me this 28th day of August, 1939. Urban F. Emme, Clerk of the Municipal Court of Los Angeles City, in said County and State. By E. L. Worrel, Deputy Clerk. (Seal.)

(Form—Sec. 3, Chap. 390, Stats. '33.)
Warrant Issued.

[File endorsement omitted.]

Issued by Ray L. Chesebro, City Attorney, by Wm. J. Lane, Deputy City Attorney.
CR A 1692.

[fol. 3] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed November 16, 1939

To the Plaintiff Above Named and to Ray Chesebro, its Attorney:

You and Each of You Will Please Take Notice, That the above named defendant E. W. Thompson is hereby appealed from that final judgment of conviction in the above entitled action and from that order, denying a motion of new trial in the above entitled action which said final judgment and said order were made on the 30th day of October and the 3rd day of November, 1939, in division 8 in the above entitled court.

That said appeal be based upon the following grounds to-wit:

(1) That the judgment of the court is contrary to the law and the evidence.

(2) That the court has erred in its decision on question of law arising during the course of the trial.

[fol. 4] (3) That the notice is based upon the records and files of the above entitled action.

Los Angeles, California. Dated 16 day of November, 1939.

Wyman G. Reynolds, Attorney for Defendant.

Defendant released C. R. pending appeal.

Walters, Judge.

[File endorsement omitted.]

[fol. 5] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

COURT'S CORRECTED STATEMENT ON APPEAL—Filed March 19, 1940

Be it Remembered that the above entitled cause came on regularly for trial on the 11th day of September, 1939, in

Division 7 of the above entitled court, the Honorable Byron J. Walters, judge presiding, the People being represented by David M. Hoffman, Deputy City Attorney of the City of Los Angeles, and the defendant being personally present in court and represented by Wyman G. Reynolds, Esq. The defendant was charged with violation of Section 3 of Chapter 390 of the Statutes of 1933 as more fully set forth in the complaint on file herein, and a trial by jury having been waived by the defendant in person and by defendant's counsel and by the People, the following proceedings were had.

MRS. GENE FARLEY, called as a witness for the plaintiff, was first duly sworn and testified in substance as follows:

That on or about the 22nd day of July, 1939, she resided at 527 Rampart Avenue, in the City of Los Angeles, and that on such day, she visited an address located and known [fol. 6] as 718 West Sixth Street in the City of Los Angeles, which such address was known as the Coast-to-Coast Travel Bureau; that she visited such address between eleven and twelve o'clock A. M. of said day, and at that place saw the defendant E. W. Thompson.

That the witness went to such address with her sister, Mrs. George Farley, and the defendant E. W. Thompson asked her if she was the girl going to the City of Dallas, in the State of Texas, to which she replied that she and her sister were both going. That at the time and place, she gave to the defendant, the sum of Twenty-two Dollars ($22.00) and the defendant gave to her and her sister a receipt for such money for transportation from the City of Los Angeles, State of California, to the City of Dallas, State of Texas. Also at such time, the defendant did advise her that he had a car going out right away and that it was a Ford Sedan automobile. That at the time she gave him the money, he did not give her a ticket, or her sister a ticket but only gave them a receipt. That after she and her sister waited at the office for quite some time, a car drove up which was a Ford Sedan automobile and she and her sister got into the car and their baggage was put into the car. That there were five (5) people in the car including the driver; that arrangement for her transportation such as the quotation of the price of the fare had been given her at another place by a person named Roy Mills at the Traveler's Hotel.

[fol. 7] That after she and her sister got into the automobile, the defendant took the receipts which he had previously given her and her sister.

BELL ALDRIDGE, a witness being called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That she resided at 2203 East Second Street, in the City of Los Angeles, and that on or about the 22nd day of July, 1939, she visited an address known as 718 West Sixth Street, in the City of Los Angeles; that she went to such address with her daughter Mrs. Edna O'dell; that she there saw a place of business known as the Coast-to-Coast Travel Bureau; that she arrived there with her daughter about 11:30 A. M. of said day and saw the defendant E. W. Thompson. She did not talk much with the defendant Thompson, having previously talked with Mr. Mills of the Traveler's Hotel.

Mr. Thompson, the defendant asked if she was the person who made the reservation to go to Dallas, Texas. She told the defendant that she was and she then paid the defendant Eleven Dollars ($11.00) for her fare from the City of Los Angeles, State of California, to the City of Dallas, State of Texas. That the defendant, Thompson, made and delivered to her a receipt for said Eleven Dollars ($11.00); that she also signed a list that had the other names on it, which list on cross examination was exhibited to her and which she identified as being the list which she signed and [fol. 8] which was offered and received in evidence as defendant's Exhibit 1, which is by reference, made a part hereof.

That she got into a 1937 Ford Sedan automobile; that there were five (5) persons including the driver in said car; that she had made arrangements and reservations for her trip with another person not having discussed it with the defendant Thompson. That the person she discussed such transportation with was some man at the Traveler's Hotel and that thereafter a car had picked them up and taken the witness and her daughter to the Coast-to-Coast Travel Bureau, the place of business of this defendant.

That this witness was exhibited a photograph of the defendant's place of business which by stipulation of counsel was stipulated to be a true and fair representation of the

exterior of defendant's place of business located at 718 West Sixth Street, in the City of Los Angeles, and which photograph was then offered and received in evidence as people's Exhibit A.

MRS. EDNA O'DELL, a witness called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That all reservations or arrangements for her trip to the City of Dallas, State of Texas, was made across the street from the defendant's place of business at a place known as the Traveler's Hotel; that she is the daughter of the last [fol. 9] witness, Mrs. Bell Aldridge; that she and her mother were going to the City of Dallas, State of Texas; that the witness did not at any time talk to the defendant E. W. Thompson, but that the witness gave her money to her mother and she observed her mother give the money for her fare to the defendant E. W. Thompson, and she observed the defendant give her mother a receipt for such money; that she gave her mother Eleven Dollars ($11.00) for her fare.

MR. MCCLURE, a witness called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That he had been working for the Standard Stations Incorporated for some months and that he owned a 1937 Ford Sedan automobile in good mechanical condition; that he talked to the daughter and wife of the defendant E. W. Thompson and later saw the defendant E. W. Thompson himself; that the first time he saw the defendant E. W. Thompson, was the day before he left for the City of Dallas, State of Texas, to-wit, on or about the 21st day of July, 1939; that he the witness was going himself on his own business to the City of San Antonio, State of Texas, and wanted to take some passengers with him to pay part of the expenses of the trip; that the defendant Thompson told him to come down to his place of business the next morning; that the witness did that and some time between elevene and twelve o'clock on or about the 22nd day of July, he saw the [fol. 10] defendant who stated to him that he had four (4)

women passengers for the witness to take to Dallas, Texas with him, and that his, the defendant's fee for securing each passenger was the sum of four dollars ($4.00) per passenger, at which time the defendant gave the witness seven dollars ($7.00) for each passenger, or a total of twenty-eight dollars ($28.00). That the witness then gave the defendant a receipt and signed a statement, which statement was then offered in evidence by the defendant, was received by the court and marked Defendant's Exhibit 1. The witness then further testified that the four (4) women passengers, Mrs. Gene Farley, Mrs. George Farley, Mrs. Edna O'Dell and Belle Aldridge, got into his automobile and their luggage was put into his automobile. That he planned to go first from the City of Los Angeles, State of California to the City of Dallas, State of Texas, with his four (4) passengers, and then continue to the City of San Antonio, State of Texas on his own business. That he had never before transported any passengers for compensation. The prosecution then rested.

The defendant moved to dismiss the action in proceeding on the ground that a primi facie case had not been established and there was insufficient evidence to support the charge which motion was by the court denied.

The defendant E. W. THOMPSON, was then called as a witness on his own behalf and after being first duly sworn, testified in substance as follows:

[fol. 11] That he received a call from Mr. Mills of the Traveler's Hotel and was advised that he had some passengers to go to the State of Texas, and that Mills had no car available and at that time, the defendant E. W. Thompson advised him that he did have a car available.

That the defendant was the sole owner of the Coast-to-Coast Travel Bureau and had been engaged in such business for approximately sixteen years. That on the date alleged in the complaint, to-wit, the 22nd day of July, 1939, he did not have a license from the Railroad Commission as prescribed by the statute here involved. That prior to 1931 he had had a license from the State Railroad Commission of the State of California. The witness was then asked if he had been advised not to secure a license, to which an

objection was made by the prosecution that the question was incompetent, irrelevant and immaterial, on the grounds that it did not tend to prove or disprove any of the issues before the court at this time. Prior to the ruling upon the objection by the court offer of proof was made on behalf of the defendant, E. W. Thompson, by his counsel, which offer of proof was in substance as follows:

That prior to 1931 the defendant had had a license from the State Railroad Commission of the State of California. That in 1931 he had applied for a license, after the law had been changed, and he had forwarded to the Railroad Commission his application, together with his check for such [fol. 12] license and in reply thereto he was advised by letter from the Commission that they were not issuing permits or license for his type of business, and that when they deemed it necessary for him to have a license they would advise him to that effect. That the objection made by the prosecution as above stated, as well as a like objection made by the People to the offer of proof, was sustained by the court. The defendant then further testified in substance that he had a pick up car and that he sent the pick up car to pick up these four (4) women and that they were going to the City of Dallas, State of Texas, but that they had been booked and the price had been agreed upon by Mr. Mills of the Traveler's Hotel.

That in all, he received Fourty-four Dollars ($44.00) from the four (4) passengers of which he gave Twenty-eight Dollars ($28.00) to the witness McClure, gave Twelve Dollars ($12.00) to Mr. Mills of the Traveler's Hotel, and retained Four Dollars ($4.00) for himself or One Dollar ($1.00) per passenger for having secured the car and attended to picking up the passengers and loading the car. That he had talked with the witness McClure on the 21st day of July, 1939, at which time he made an agreement with Mr. McClure to secure passengers for him to pay the expenses on the trip to Dallas, Texas. That he had told Mr. McClure that his commission fee for securing each passenger would be four dollars ($4.00) per passenger, and [fol. 13] that the balance of seven dollars ($7.00) for each passenger was to be paid to Mr. McClure by him.

That thereupon, the defendant rested and the court continued the cause until the 24th day of October, 1939, for the purpose of argument. That thereafter, the cause was con-

tinued from time to time by stipulation of counsel and written memorandum of authorities were submitted to the trial court, and thereafter, on the 30th day of October, 1939, the court after rendering its opinion found the defendant guilty as charged and thereafter, continued the imposition of sentence until the 3rd day of November, 1939. That on said day, defendant did make a motion for a new trial on all of the grounds as set forth in Section 1181 of the Penal Code, and in particular on the ground that the verdict is contrary to the law and the evidence and that the court erred in the decision of question of law arising during the course of trial, which said motion for a new trial was submitted to the court and was by the court denied, that thereafter, an application for probation was made by the defendant, which application was granted by the court and the matter set down for hearing on such application to the 16th day of November, 1939, at which time there being no legal cause why the sentence should not be pronounced, the court did sentence the defendant to pay a fine of Two Hundred Fifty Dollars ($250.00) or serve fifty (50) days in jail, which said sentence was suspended and the defendant placed [fol. 14] upon probation for a period of one (1) year on condition that the defendant conform with all of the rules and regulations of the probation office and that the defendant not engage in such like or similar business during such probationary term.

That thereafter, the defendant did give written notice of appeal and did appeal from the final judgment of conviction in the above entitled action and from that order denying a motion for a new trial in the above entitled action as hereinabove noted, on *on* the following grounds:

That the judgment of the court is contrary to the law and the evidence;

That the court has erred in its decisions on questions of law arising during the course of the trial;

That this appeal is based upon this Statement of Appeal and upon the Exhibits therein noted being People's Exhibit A, and defendant's Exhibit 1, and upon all the records and files in the above entitled action.

Wyman G. Reynolds, Attorney for Defendant and Ap-ellant.

The court does hereby settle and allow the foregoing Statement of Appeal and certifies that the same is a true and correct statement of the proceedings had in the above [fol. 15] entitled action.

Dated: 19 day of March, 1940, Los Angeles, California.

Byron J. Walters, Judge of the Municipal Court.

Received copy of the within statement this 19 day of March, 1940. David M. Hoffman, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 16] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

CR A 1692

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant

APPELLANT'S POINTS AND AUTHORITIES—Filed March 28, 1940

Comes Now the appellant, above named, and respectfully files for the consideration of the above entitled court the following points and authorities, to-wit:

I

There is no evidence to show or establish that the defendant acted as a motor carrier transportation agent in that the evidence entirely fails to disclose that the defendant at any time in any capacity sold, offered for sale or negotiated for any transportation to be furnished by a motor carrier but the contrary affirmatively appears from the record in this case.

Statute 1933 Cha ter 390 as amended by Statutes 1935 Chapter 665 Section 2.
Statement on Appeal line 17 to line 20 inclusive.
Statement on Appeal line 16 to line 22 inclusive.
Statement on Appeal line 24 to line 28 inclusive.

[fol. 17]

II

The evidence wholly fails to establish that the transportation herein involved was performed or to be performed by a motor carrier as defined by the motor carrier transportation agents act, to-wit, a common carrier, but does on the contrary establish that the carrier involved was and only was a private carrier.

Forsythe vs. San Joaquin Light and Power Corporation, 208 California 397.

Alword vs. Johnson, State Treasurer, 208 California 359.

Associated Company vs. Railroad Commission, 178 California 518.

California Jurisprudent Volume 4, Section 2, Page 814 and 815.

III

The eviden-e to show a business to have been dedicated to public use as a common carrier must be unequivical as regards the intention to dedicate to public use.

Clapp vs. Railroad Commission, 192 Cal. 689.

IV

The power to regulate commerce with foreign nations and among the several states is an exclusive power.

People vs. Downer, 7 Cal. 169.

V

The several states have no power to pass laws regulating commerce among themselves, but by United States Consti-
[fol. 18] tution Article I, Section VII, that power is vested exclusively in Congress.

Carson River Lumber Company vs. Patterson, 33 Cal. 334.

VI

Where the state has not the constitutional power by means of direct legislation to regulate the intercourse of its citizens with foreign nations and with the other states, it cannot accomplish by indirect method what it is forbidden to do directly.

People vs. Raymond, 34 Cal. 492.

VII

Congress of the United States has exclusive power to regulate interstate commerce.

Smith vs. Industrial Accident Commission, 26 Cal. App. 560 at 564.

Bedig vs. Southern Pacific Company, 84 Cal. App. 325.

VIII

Whenever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule.

Atchison Topeka and Santa Fe Railway Company vs. Railroad Commission, 190 Cal. 214.

IX

The license requirement of the Motor Carrier Transpor-
[fol. 19] tation Agents Act herein involved being Statute of 1933 Chapter 390 as amended by Statutes of 1935 Chapter 665 unconstitutionally affects interstate commerce.

Motor Transit Company, et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

X

As a matter of business, the sale of tickets or the arranging of transportation and the operation of stages cannot be separated in the matter of interstate and intrastate commerce.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

XI

The sale of a ticket or the arranging of transportation from one point to another over connecting lines to a designation across state lines cannot practically be made up by different persons.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

XII

The requirements that before a person is authorized to sell interstate transportation tickets or transportation, he must submit his application to the discretion of the State Railroad Commission and be passed by it and be required to place a bond and submit generally to the state regulations is unconstitutional and invalid.

[fol. 20] Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

DiSanto vs. Pennsylvania, 273 U. S. 34, 71 L. Ed. 524.

McCall vs. California, 136 U. S. 104, 34 L. Ed. 391.

Bowman et al. vs. Continental Oil, 256 U. S. 642, 65 L. Ed. 1139.

Adams Express Company vs. New York, 232 U. S. 14, 58 L. Ed. 483.

Cooney vs. Mountain State Telephone and Telegraph Company, 294 U. S. 384, 79 L. Ed. 934.

Krutcher vs. Kentucky, 141 U. S. 47, 35 L. Ed. 649.

Texas Transport et al. vs. City of New Orleans, 264 U. S. 150, 34 L. Ed. 907.

XIII

Under the act, no tickets or transportation of any nature could be arranged for even by officers or employees, or agents of any corporation, public carrier or otherwise, which would result in untold confusion and general inconvenience to the company and to the traveling public except by the Railroad Commision discretionarily licensing such persons, which act by its terms would be practically impossible of enforcement and does offend against the commerce clause of the United States Constitution.

Pennsylvania vs. West Virginia, 262 U. S. 553. 67 L. Ed. 1117.

Pierce vs. Society of Sisters, 268 U. S. 510, 69 L. Ed. [fol. 21] 1070.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

Respectfully submitted, Wyman G. Reynolds, Attorney for Defendant and Appellant.

Received copy of the within this 28 day of Mar. 1940.
John L. Bland, D. C. A., Attorney for Rspt.

[fol. 22] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

RESPONDENT'S POINTS AND AUTHORITIES—Filed March 28, 1940

I

The record in this case shows that McClure, owner of an automobile, told Thompson that he would like to secure some passengers going to Dallas, Texas, and that Thompson told him to report at his place of business upon a named day (Statement on Appeal, Page 4, Lines 15 to 24), and that when he reported at such place of business on the date named Thompson had four passengers (Statement on Appeal, Page 4, Lines 24 to 27.)

Witness Gene Farley testified that she paid Thompson money for transportation to Dallas, Texas (Statement on Appeal, Page 2, Lines 1 to 9), at which time Thompson told her he had a car going right away; that when the car came she was given a seat therein and her luggage was also [fol. 23] loaded in the car, at which time Thompson took up the receipts previously given her. (Statement on Appeal, Page 3, Lines 13 to 22).

The testimony of Bell Aldridge is to a similar transaction (Statement on Appeal, Page 2, Line 26 to Page 3, Line 9). She testified that "arrangements" for purchase of the transportation had been made with some other person. The testimony of Witness O'Dell, commencing on Page 3, Line 31 is to the same general effect.

There is some testimony to the effect that a person named Mills communicated with Thompson in regard to securing transportation for these passengers.

II

From consideration of the record it appears amply sufficient to support the implied finding of fact that Thompson sold transportation by automobile from Los Angeles, California, to Dallas, Texas.

III

For the purpose of this appeal it is not necessary to determine the part played by Mr. Mills. If it be considered that the sale was made by Mills, and that Thompson only collected the money, the judgment is supported by the provisions of Section 31, Penal Code. Thompson aided and assisted in the sale of such transportation and it does not appear that Mills was the holder of a license authorizing such sales.

[fol. 24]

IV

The matter of the validity of the act named in the complaint in this case, as applied to the sale of interstate transportation has been recently argued in this court sitting in Department 22 in the case of Wintjen vs. Board of Public Works, etc., Superior Court No. 447423, and is now under submission.

We see no need of repeating herein the rather lengthy list of citations and the extensive argument in that case.

V

The defendant attempted to raise the defense that he was advised by the Railroad Commission that he did not need a permit.

We are not unmindful of the decision in the case of People vs. Ferguson, 134 Cal. App. 41. We fail to see the application of that case to the case at bar. As the court pointed out (Page 52) the Corporate Securities Act is a most complicated law. It covers in its operation a multitude of businesses.

The difficult question which often arises is whether or not a certain method of business brings a person within the provision of that Act.

The necessity of a permit for persons coming within the provisions of the Act here involved, is never in doubt.

The law involved in the instant case defines with no un-

[fol. 25]

certainties a motor carrier transportation agent. It does not leave it to the judgment or discretion of some state official to determine whether doing certain acts constitutes engaging in the business of selling motor transportation. The defendant does not urge that the Railroad Commission informed him that he was not a transportation agent.

What actually happened was that the Railroad Commission undertook to be lawyers, and to pass upon the effect of a statute of the United States upon a then existing law of the State of California.

It is not my opinion that the District Court of Appeals did hold or intended to hold that where a law was plain in its provisions and unambiguous in its details the interpretation placed thereon by an administrative officer would justify disobedience thereof by members of the public.

To illustrate my meaning, we will suppose that a person convicted in the State of Iowa of the crime of burglary wished to possess a weapon capable of being concealed on the person, and that he was advised by a sheriff or chief of police or other official having the power to issue permits so to do that he was entitled to possess such weapon because the conviction of burglary did not make him a convict. It is not conceivable that reliance upon such advice would protect him from punishment for having violated the provisions of the California Concealed Weapons Act. Presuming that such sheriff issued a permit to this individual to [fol. 26] carry such weapon on his person, it can hardly be considered possible that such permit would protect him in such unlawful possession.

In short, it does not seem reasonable to suppose that by the ruling in the Ferguson Case, it was intended to let administrative officers set at naught all the penal laws of the state. To do so would have such a demoralizing effect upon the administration of the law that common sense tells us the ruling in the Ferguson Case should be confined in its application to exactly similar circumstances arising under that particular law. The court pointed out that the exception which they were then making was an exception to the general rule applicable to law enforcement.

VI

The invalidity of a rule of an executive board does not justify one in conducting a business for which a license is required.

Commonwealth vs. McCarthy (Mass.), 114 N. E. 287.

VII

The penalty for engaging in an occupation for which a license is required cannot be avoided because the adminis-

trative authorities charged with administering the law refused to grant a license.

State vs. Stevens (N. H.) 99 Atl. 723, L. R. A. 1917, 528.

[fol. 27]

VIII

Determination of whether a person violated the provisions of a law is not to be determined by the practice of an administrative board in its administration of the law.

State vs. Largomarcino-Grape Co. (Ia.) 223 N. W. 512.

IX

Courts may take judicial notice of the acts of executive departments of the state (C. C. P., Sec. 1875). It follows that courts may take judicial notice of the fact that though the Railroad Commission at one time undertook to officially promulgate a ruling to the effect that persons engaged in the occupation of selling only interstate motor transportation need not secure a permit, such board shortly thereafter—within about one or two months as is shown by papers on file in the Wintjen Case, supra,—promulgated a rule that all persons selling motor transportation, save and except those selling transportation over authorized interstate carriers, must secure a license from the Commission.

X

In view of the fact that the ruling in the trial court corresponds with conditions as they now exist, and as they have existed for several years under the rulings of the commission this court must presume that the trial court took judicial notice of the status existing at the time named in the [fol. 28] complaint.

XI

In as much as the incorrect information or ruling of the Commission which defendant claims to have received had been corrected by later action of the Commission it was proper for the court to refuse to permit introduction of evidence concerning the information alleged to have been given defendant unless it was shown to have been given him subsequent to the time the ruling last given as above stated was made, even though by some mysterious reasoning it can be said that the rule in the Ferguson Case should be

extended to cover the situation caused by the first ruling of the commission.

XII

The offer of proof was improper and insufficient. If defendant filed an application such application was itself the best evidence of whether the defendant actually filed an application in proper form. If, as stated, the Commission notified him by letter that he need not procure a license, such letter was the best evidence of what the Commission informed him.

In the record there appears no offer to introduce such proper evidence and the record indicates, at least to us, that the offer was to prove certain facts by parol evidence to be given by the defendant.

[fol. 29]

XIII

It appears that the court did not err in refusing to accept proof concerning the ruling of the Commission upon appellants offer of proof.

It further appears that if such proof of what occurred in 1931 was admissible such testimony would have been properly offset by showing promulgation of a different ruling upon the subject. Therefore, such exclusion of evidence did not prejudice the appellant.

IX

As pointed out heretofore, there exists in the records technical reasons why the ruling of the court upon admission of evidence must be sustained.

However, determination of the effects of the ruling in the Ferguson Case, supra, and the limitations which must be placed upon the application of such ruling is of such importance that it is hoped the court will not content itself with supporting the judgment upon technical grounds, but will explain for the benefit of trial courts the actual effect of the Ferguson Case.

Respectfully submitted, Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent.

[fol. 30] Received copy of the within this 28 day of Mar., 1940.

Wyman G. Reynolds, Attorney for Deft. & Appel.

[fol. 31] IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

MEMORANDUM OPINION—Filed June 4, 1940

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed with directions.

Two conclusions are inescapable. In the first place the evidence supports the conviction; appellant did violate the terms of the statute (Act 5130c, Deering's Gen'l Laws 1937) that prohibits an unlicensed person from acting in the capacity of a motor carrier transportation agent. He sold transportation over the highways of this state, which a Mr. McClure had offered to furnish. He (the defendant) thus acted in the capacity of a motor carrier transportation agent under sections 2 and 14 of the act, if Mr. McClure was a motor carrier. That Mr. McClure was a motor carrier, within the definition of that term in section 2 of the act, follows from the unadorned fact that he offered to transport persons for compensation over the highways of this state.

[fol. 32] It also appears, however, that the only transportation Mr. McClure offered to furnish, and the only transportation the defendant sold, within the confines of this case, was from Los Angeles, California, to Dallas, Texas. The requirement of the act (sections 3 and 8) that no one may act as agent in selling transportation without securing a license, to obtain which a one thousand dollar bond must be provided, in so far as it is attempted to be applied to a purely interstate operation such as that involved here, is a direct not merely incidental burden on interstate commerce, beyond the power of a state to impose. The case of Motor Transit Co. v. Railroad Commission of California (1936) 15 Fed. Supp. 630, so held with respect to the statute we are considering, and as pointed out by Judge Wilbur (p. 633), "The decision of the Supreme Court in Di Santo v. Commonwealth of Pennsylvania, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524, is decisive upon that question."

Because the complaint is defective is not alleging the acts claimed to have been done by the defendant except by

an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Bishop, Judge.

Dated June 4, 1940.

I concur.

Schauer, Judge.

[fol. 33] CONCURRING OPINION

I concur. This case is distinguishable from that involved in Wintjen v. City of L. A., L. A. Superior Court No. 447423. There, according to the complaint considered, the plaintiff sold no tickets or transportation and collected no money in payment for transportation, but merely conducted a sort of information bureau where those desiring transportation and those willing to furnish it might be brought together so that they could make their own arrangements. It was held that such a business did not so directly affect interstate commerce as to remove it from the power of the state unless Congress should act upon it. To that decision I still adhere. See Hartford Acc. etc. Co. v. Illinois (1936) 298 U. S. 155, 80 L. Ed. 1099. In this case, however, the defendant directly sold the transportation to those desiring it and collected the price thereof. While he did not issue anything denominated "tickets," he did give the prospective passengers receipts which served the same purpose and were taken up by him when transportation began. I can see no way to escape the application of the authorities cited in the foregoing opinion to such a case. But the statute is not thereby rendered invalid as a whole. It may still operate on intra-state transportation and in cases which are like the Wintjen case in their facts.

Shaw, Presiding Judge.

[fol. 34] [File endorsement omitted.]

[fol. 35] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PETITION FOR REHEARING—Filed June 10, 1940

Comes now the above named respondent and respectfully petitions the Court to vacate and set aside the decision heretofore rendered in the above entitled matter, and to grant a rehearing upon the questions involved in the appeal in such case, and as grounds therefor, alleges:

I

That the Court erred in holding that the decisions in the cases of Motor Transit Company v. Railroad Commission, 15 Fed. Supp. 630, and Di Santo v. Commonwealth of Pa., 273 U. S. 34, 71 L. Ed. 524, governed the case at bar.

II

That the Court erred in holding that certain statements found in the above named cases are now the law, as deter-
[fol. 36] mined by the decision of the United States Supreme Court.

III

That the Court erred in not giving proper legal effect to the provisions in the Federal Motor Carrier Act exempting from its regulatory provisions carriage of passengers by casual, occasional and reciprocal carriers.

Argument

Point I

The Di Santo and Motor Transit Company Cases Do Not Govern the Case at Bar

It is a principle too well settled to require extended discussion that statements found in decisions of our courts must be limited in this application to the facts which were before the Court. It becomes necessary then for us to examine the facts in each of the cases heretofore named and to

which reference was made in the opinion of this Court for the purpose of determining whether there appears facts common to such cases and the case at bar so as to impel the conclusion that those cases are decisive of the point involved in the pending appeal. In view of the fact that the Motor Transit Company decision is bottomed upon the Di Santo case, we shall first examine such latter case.

Such examination discloses that Di Santo was an authorized agent for four steamship companies.

"Plaintiff represented four steamship companies oper- [fol. 37] ating steamships between the United States and Europe. Each of them gave him a certificate authorizing him to sell * * *, tickets and orders for transportation * * *."

Di Santo v. Commonwealth, supra, L. Ed. p. 526.

The tickets sold were furnished Di Santo by the various companies (Id. same page) and he accounted to his principals (the steamship companies) for such tickets (Id. same page).

It is not here contended that Di Santo was a salaried employee of the various companies. Except as to the method whereby he received remuneration for his work he was as much a representative of the companies as he would have been had he been upon the payrolls of such firms as a ticket agent. The regulation objected to was therefore a direct regulation of the companies themselves.

There is a vast gulf between the person who is a direct representative of a firm engaged in interstate commerce selling the articles furnished him by his employer, at a place of business named by such employer, and one who secures orders for or sells a given article upon his own account, placing the custom he secures with whatever firm best suited to his convenience. In the one case he is the representative of the firm which has engaged his services. In the other case he is an independent contractor.

The Di Santo case has been distinguished by the court which wrote the decision. In the case of Milk Control Board [fol. 38] v. Eisenberg Farm Products, 306 U. S. 346, 83 L. Ed. 752, the court said: (L. Ed. p. 756)

"None of the decisions on which the court below and the respondent rely rules the instant case. Di Santo vs. Pennsylvania, 273 U. S. 34, 74 L. Ed. 524, 47 S. Ct. 267, *involved*

a state law directed solely at foreign commerce." (Emphasis added.)

In the Milk Control Board case, supra, the court also said (L. Ed. p. 756):

"This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens."

As pointed out above, except as to matters of such nature, that if regulated at all, all regulations must be uniform throughout the nation, the states are at liberty to act so [fol. 39] long as Congress has not seen fit to act. That the licensing of motor carrier ticket agents is not a matter requiring uniform regulation, but is susceptible of regulation calculated to meet local conditions, seems to us to be so patent that no extended argument is required to support the proposition.

As we shall hereafter point out in detail, the federal law does not attempt to regulate the business of the appellant, and in fact, explicitly excludes it from such federal regulation.

Examination of the Motor Transit Company case, supra, discloses that the action was instituted,—not by persons acting as motor carrier transportation agents, but, by motor carriers engaged in interstate commerce. The action was brought to preserve and protect their rights as operators of passenger stage lines, and not for the purpose of protecting the rights of their employees or of other persons selling transportation. Again the well known rule, that statements made in an opinion are to be read in the light of the facts before the court in the case in which the statements were made, applies.

It is not, however, so necessary to depend upon the rule in considering this case for it affirmatively appears by the

decision itself that the court expressly limited the effect of their opinion to the situation of the plaintiffs, and, of course, those similarly situated.

[fol. 40] The court said: (15 Fed. Supp. p. 630)

"The issue here is narrowed to the point: Does the license requirement unconstitutionally affect interstate commerce *to the irreparable injury of complainants?*" (Emphasis added.)

The court in such case grounded its opinion upon the statement in the Di Santo case, supra, to the effect, that a state could not impose a direct burden upon interstate commerce. As we shall hereafter show more fully, the court which decided the Di Santo case has, since the decision in the Motor Transit Company case, repudiated the doctrine that states may place no direct burden upon interstate commerce, and has declared such direct interference legal if the local situation justifies the enactment of the statute.

The overruling of the rule in the Di Santo case necessarily renders the quotation thereof in the Motor Transit Company case ineffective, and insofar as the Motor Transit Company case may depend upon the Di Santo case for its correctness it now is a decision without a foundation, and is itself overruled by a later decision of a higher court.

Point II. State Laws Which Directly Affect Interstate Commerce Are Not Necessarily Invalid

Because of the fact that this court quoted certain language from the Di Santo case, we conclude that the court felt [fol. 41] that this law directly affected interstate commerce and that any state statute which directly affects interstate commerce is invalid. While we cannot agree with the conclusion, that one whose entire operations are local in character and who peddles his interstate business to whomsoever he finds willing and able to handle the same, is engaged in interstate commerce, we do not find it necessary to argue the point here. If it can be said, that the quoted portion of the Di Santo case is to be considered as a flat, unqualified statement of constitutional law, without taking into consideration the facts involved in that case, we find that by direct and unequivocal language the same court has overruled such quoted language in a subsequent decision.

In Eichholz v. Public Service Commission, 306 U. S. 268, 83 L. Ed. 641, the court said: (83 L. Ed. p. 646)

"But in the absence of the exercise of federal authority, and in the light of local exigencies, *the State is free to act in order to protect its legitimate interests even though interstate state commerce is directly affected.*" (Emphasis added.)

It thus appears that, whatever may have been the rule of law at the time of the Di Santo and Motor Transit Company cases, the rule as laid down by the Supreme Court now is that state legislation, in itself a proper exercise of the police power, does not run counter to the provisions of the Federal Constitution, even though interstate commerce [fol. 42] be directly affected, but that a state law may not conflict with federal enactments.

Point III. Congress Specifically Exempted Occasional Irregular and Incidental Carriers or Passengers from Federal Regulation

The Federal Motor Carriers Act of 1935 (U. S. C. A. Title 49, Chapt. 8, Sec. 303, Subdiv. (b), insofar as pertinent to this case, provides as follows:

"Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (here follow a list of seven positive exclusions) nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter * * * apply to: (8) * * * or (9) the casual, occasional or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

Whether the provision apparently intended to give the Interstate Commerce Commission authority to determine [fol. 43] whether control of that class of carriers named in Item 9 as casual, occasional or reciprocal carriers, hereafter referred to as Casual Carriers, if investigation by the Com-

mission should show the need therefor, actually gives the Commission power to take over the regulation of carriers need not be determined at this time.

It is not claimed by anyone that the Commission has taken action which would authorize them to take jurisdiction and regulate such carriers.

Section 311 of such Chapter 8 provides for licensing of persons who sell transportation which is subject to such Chapter 8.

Before securing such license he must prove that he is a fit and proper person to engage in the business of selling such transportation and must provide a bond in an amount set by the Commission.

Insofar as this law is concerned the only independent ticket agents or brokers required to procure licenses from the Commission are those selling transportation governed by the Act.

Transportation by casual carriers is not now governed or regulated by the Act; hence, brokers who, as did the appellant, sell tickets for transportation by casual carriers do not come within the provisions of Section 311 requiring that they secure licenses from the Commission. In other words, the federal law does not at present govern or regu- [fol. 44] late the activities of casual carriers or ticket brokers or agents selling transportation by such casual carriers.

In Mauer v. Hamilton, — U. S. —, 84 L. Ed. (Adv. Sheets) 641, the court said, at page 679:

"As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especailly the case when public safety and health are concerned. Kelly v. Washington, 302 U. S. 1, 10-14, 82 L. Ed. 3, 10-13, 58 S. Ct. 87; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85, 83 L. Ed. 500, 505, 59 S. Ct. 438 and cases cited."

In Kelly v. Washington, 302 U. S. 1, 9, 82 L. Ed. 3, 10, the court said:

"Under our constitutional system there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their ter-

ritorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151 Ann. Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective [fol. 45] power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' (Citing numerous cases.)"

In Atchison, Topeka and Santa Fe Railway v. Railroad Comm. of Calif., 283 U. S. 380, 392, 75 L. Ed. 1128, 1137, the court said:

"The considerations which led the court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required. The principle thus applicable had been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the [fol. 46] state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state."

A case very much in point is Hartford Accident & Indemnity Co. v. People of the State of Illinois, 298 U. S. 155, 80 L. Ed. 1099.

The Illinois statute involved required that persons dealing in consignments of farm produce for sale on commission must secure a license and provide a bond in the sum of $5,000.00.

The appellant was surety upon the bond of the Cross Company, a bankrupt, and instituted suit to avoid liability upon the bond. The basis of the claim of nonresponsibility was that the law was unconstitutional on account of placing a bruden on interstate commerce.

The federal act, which appellant urged rendered the state act void, differed from the Motor Carriers Act of 1935 in that in addition to not covering the entire field of regulation it especially provided that state statutes not in conflict were to remain in full force and effect. It is patent, however, that such provision could be nothing more than a rule of interpretation. If the statute of Illinois actually placed an unlawful burden on interstate commerce in violation of constitutional provisions, a declaration of policy by Congress could not make it any the less so.

There is a similarity of facts between that case and the [fol. 47] one at bar. In the Hartford Accident & Indemnity Co. case appellant's principal was a dealer in goods received in interstate commerce, and sold the goods in the local market as an independent contractor or commission agent. In the case at bar the appellant is a local dealer in transportation, making contracts upon his own account and not as agent of the operator of a motor carrier, and ships passengers so secured by whomsoever he finds willing to haul his custom.

In the Hartford Accident & Indemnity Co. case, 80 L. Ed. 1099, at page 1101, the court said:

"The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells farm produce forwarded to him from points without, as well as points within the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article 1, Sec. 8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective.

"The appellant urges, however, that Congress had adopted [fol. 48] an act regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the Federal act does not cover the same field, or is consistent with it. But it is said the state and Federal laws are similar in their provisions and, therefore, the exercise by Congress of its paramount power nullifies the state statute. The Federal act requires every person, partnership, association, or corporation, who is engaged in the business of receiving in interstate or foreign commerce perishable agricultural commodities, defined as 'fresh fruits and vegetables of every kind and character,' for sale on commission to procure a license from the Secretary of Ag-iculture. The act parallels the state statute in respect of the requirements of proper accounting, honest dealing, and prompt remittance. While it provides for awards of reparation by the Secretary of Agriculture for non-compliance with its prescriptions, gives a right of action to consignors and shippers for violation of its provisions, authorizes the revocation of licenses and imposes penalties, thus covering to some extent the same ground as the State law, it does not call for the giving of any bond by a licensee. Moreover, Sec. 15 provides:

'This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall [fol. 49] remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto.'

"Thus the act of Congress not only omits the requirement of a bond, but affirmatively saves the provision of the Illinois act as to that form of security. As respects the bond and the protection thereby afforded to consignors, there is not inconsistency between the two acts and both may be given effect."

The situation presented to the court in the Motor Transit Company case and in the case at bar is easily distinguished.

In the Motor Transit Company case acts of their agents were acts of the company and the company was directly engaged in interstate commerce. In the case at bar the act of the appellant was not the act of the carrier but was in fact a local transaction wholly completed, insofar as the sale of transportation was concerned, when his deal with pro-

spective traveler was closed. There was still no liability assumed by a carrier. Thompson had entered into a contract to secure transportation for his client by some person then unknown to such client. The client did not look to any carrier for fulfillment of his contract but looked only to Thompson to see that he was transported to his promised land.

The analogy between the situation presented by the facts in the Hartford Accident & Indemnity Co. case, supra, and [fol. 50] the case at bar impels the conclusion that, even though the Hartford Accident & Indemnity Co. case did not involve the sale of transportation the law of that case must govern the instant appeal.

As aptly pointed out in Francis v. Allen (Ariz.) 96 Pac. (2d) 277, the operation of the law is only upon the person engaged in the business of selling tickets and does not attempt to prohibit or regulate the transportation of passengers.

In the case of Columbia Terminals Company v. Lambert, 30 Fed. Supp. (Adv. Sheets) 28, the court said:

"The first ground assigned as a basis for the claim of unconstitutionality of the state statutes is without merit. That state regulatory laws relating to the operation of motor vehicles in interstate commerce were not superseded upon the enactment of the Motor Carriers Act of 1935 has now been definitely determined. Eichholz v. Public Service Commission of Missouri, 306 U. S. 268, 622, 59 S. Ct. 532, 83 L. Ed. 641; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 59 S. Ct. 438, 83 L. Ed. 500; South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734."

We quote further, as follows:

"Since the Interstate Commerce Commission has not assumed authority to regulate plaintiff's operations here involved the authority of the state to regulate those opera- [fol. 51] tions has not been superseded."

and as follows:

"Absent action under the federal statute, the power of the state to regulate or burden interstate commerce extends only to acts consistent with an exercise of police power or proper taxing power. *Reasonable police regulation are*

not an unlaful burden upon interstate commerce and are justified so long as Congress has not occupied the field." (Emphasis added.)

That the matter is one which requires regulation is pointed out in Finn v. R. R. Comm., 2 Fed. Supp. 891; that the Federal law does not cover has not been disputed.

The situation which confronts us is well stated in Latta Truck Lines v. Hargus, 29 Fed. Supp. 53, 55.

"Since there has been no actual adjudication of plaintiff's status by the Interstate Commerce Commission and since it appears that a long period of time may elapse before that body may have an opportunity to act in that regard, to now restrain the defendants from preventing that which the Missouri Commission has characterized as a pretext for the purpose of avoiding the payment of charges incident to the use of the public highways, would result in neither the local commission, because of lack of authority, or the federal commission, because of lack of opportunity, being able to cope with the situation. The legislative intention to regulate motor vehicle transportation for hire over the [fol. 52] highways of the state and nation is indubitably evidenced by existing State and Congressional legislation."

That part of the opinion heretofore rendered, holding the law void as to appellant, should be vacated and set aside.

Conclusion

The difference between the facts in the Motor Transit Company case and the case at bar are in principle the same as the difference between a firm engaged in shipping fruit purchased by its agent, and a person engaged in buying gruit in the local market and selling to a firm shipping interstate.

In the case of purchase by shipper, the purchase would be incidental to the transportation and the entire transaction would be interstate in character. The seller of the fruit would know the firm to which he sold and would look to them for payment. In the case of purchase by one expecting to sell to shipper the transaction would be entirely local up to the time the purchaser closed his deal with the seller.

In the matter of the Motor Transit Company the purchaser of transportation would buy direct from the carrier

to whom he looked for performance of the contract. In the case at bar his transaction was not with the carrier but was with a local dealer to whom he looked to supply him with the transportation he purchased.

If the local purchase of fruit for subsequent sale to an interstate shipper is intrastate commerce, and we do not [fol. 53] think it can well be argued that such is not a fact, certainly the local sale of transportation to be accomplished by some deal between the seller and some one willing to undertake the carriage is not interstate commerce, and the fact that the seller may have in mind some person who is willing to accept his commitments does not alter the fact.

But, even if it be considered that the transaction has some of the earmarks of interstate commerce, it is so far removed from interstate channels at the time the ticket is sold that any interference is indirect and incidental. However, as shown heretofore, the mere fact that a state law directly affects interstate commerce does not render it invalid so long as it does not place an undue burden thereon.

As to the form of complaint, there is no objection to the conclusion of the Court, and there is no objection to the judgment being reversed and remanded with instructions to amend the complaint before again placing appellant on trial.

Wherefore, respondent respectfully submits, that the decision hertofore rendered in the above entitled proceeding be set aside and the case again placed upon the calendar for argument, or, that the judgment rendered in said action by the trial court be reversed upon the sole ground that the complaint was insufficient to state a cause of action under the law.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, Attorneys for Plaintiff and Respondent.

[fol. 54] AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013a)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

RHEBA KELLNER, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County

of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 260 City Hall, Los Angeles, California; That on the 10th day of June 1940 affiant served the within Petition for Rehearing on the defendant and appellant in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said defendant and appellant, at the office address of said attorney, as follows: Wyman G. Reynolds, Attorney at Law, 1223 Chester Williams Building, Los Angeles, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post-office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place [fol. 55] so addressed.

Rheba Kellner.

Subscribed and sworn to before me this 10th day of June 1940. Dorothy Simpson, Notary Public in and for the County of Los Angeles, State of California.

[fol. 56] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

ORDER GRANTING REHEARING—Filed July 3, 1940

The petition of respondent for a rehearing after judgment of this court on appeal in the above entitled case having been filed and having been duly considered,

It is Now Ordered that said petition be granted, the judgment of this court heretofore rendered in said case is hereby vacated and a rehearing is hereby ordered. Said case is hereby submitted for decision without further argument.

Dated: July 3, 1940.

By the Court: Shaw, Presiding Judge. Bishop, Judge. Schauer, Judge.

[fol. 57] In Appellate Department of the Superior Court, County of Los Angeles

Superior Court No. CR A 1692

Trial Court No. 93602

People of the State of California, Plaintiff and Respondent

vs.

E. W. Thompson, Defendant and Appellant

Memorandum Opinion on Rehearing—Filed October 15, 1940

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed.

The complaining witness paid for what she believed to be, and so far as we are aware proved to be, transportation from Los Angeles to Dallas, Texas. No one so far has questioned what seems to us to be an obvious conclusion, that whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again. The contract made with the complaining witness, therefore, was in the field of interstate commerce.

Who was it that undertook to transport the complaining witness (and three others) to Texas? In an endeavor to distinguish the case under review from Di Santo v. Pennsylvania (1927) 273 U. S. 34, 71 L. ed. 524, counsel for the [fol. 58] People picture our case as one where the defendant "secures orders * * * upon his own account * * * he is an independent contractor." The evidence supports this conclusion, i. e., that the defendant as principal undertook to transport the complaining witness to Texas. If so, the defendant would appear as the motor carrier and not as a motor carrier transportation agent, and the judgment of conviction would have to be reversed on that ground. The evidence, however, also supports the conclusion, doubtless reached by the trial judge, that the owner and driver of the automobile was the motor carrier, the principal in the transaction, and that the defendant acted

as his agent in securing passengers and in collecting compensation for the passage. On this view of the evidence, the defendant was proven guilty of the charge brought against him, for admittedly he did not have the license required by the act.

Can the act (Act 5130c, Deering's Gen'l Laws) validly do that which it has expressly attempted to do until federal action takes the field, i. e., require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce? In answering this question we are gently admonished by counsel to follow cases which are in point rather than those which involve facts far afield. So it is that we follow Di Santo v. Pennsylvania, referred to above, rather than Hartford &c Co. v. People (1936) 298 [fol. 59] U. S. 155, 80 L. ed. 1099; Milk Control Board v. Eisenberg Farm Products (1939) 306 U. S. 346, 83 L. ed. 752; McGoldrick v. Berwind-White Coal Mining Co. (1940) 84 L. ed. Adv. Ap. 343; Maurer v. Hamilton (1940) 84 L. ed. Adv. Op. 671, each of which deals with a statute affecting interstate commerce at points quite removed from that where our statute presses. The Di Santo case, however, is much in point. There an individual had been convicted of acting as ticket agent without the license and bond required of one selling tickets on behalf of steamship companies. The license and bond were not required of those actually furnishing the transportation, nor of their officers or employees, nor were they parties to the action. The judgment of conviction was reversed, however, because, the federal supreme court held, (1) to require a license and bond of one who was the ticket agent of a company engaged in foreign commerce was to place a burden on foreign commerce which a state may not impose, and (implicit in the decision), (2) of the statute's invalidity the ticket agent may complain.

It may well be that the next time this question is presented to the supreme court a different answer will be given. It is within their power, not ours, to reverse their decisions. It may be that they would differentiate our statute from that involved in the Di Santo case because the latter dealt with foreign commerce, while our statute deals with interstate commerce. We find in the words [fol. 60] granting power to the Congress, "To regulate Commerce with Foreign Nations, and among the several

States, and with the Indian Tribes" (Art. I, sec. 8, U. S. Const.) no recognition of a greater immunity from state legislation affecting foreign commerce than that affecting interstate commerce. We recognize that many state-imposed burdens on and many state-created conflicts with interstate commerce have been permitted. But the particular burden involved here has been adjudged one that a state may not impose. We feel bound by the supreme court's determination of the question.

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action. If, as may be, the People are in a position to prove that the defendant acted as ticket agent for motor carriers doing an intrastate business, the dismissal may be made for the purpose of filing an amended complaint.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated October 15, 1940.

Bishop, Judge.

We concur.

Shaw, Presiding Judge. Schauer, Judge.

[fol. 61] [File endorsement omitted.]

[fol. 62] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PETITION FOR REHEARING—Filed October 22, 1940

Comes now the People of the State of California, Plaintiff and Respondent in the above entitled action and respectively petitions the court to set aside the decision and order heretofore made in such action and grant a rehearing in said cause.

As grounds for such petition we respectfully urge that the court erred in holding that the case of Di Santo v. Penn-

sylvania, 273 U. S. 34, 71 L. ed. 524, was determinative of the question of law involved in the instant proceeding; that the court failed to give proper weight to the rule of law that where the federal government has failed to enact statutes covering a matter within the legislative powers of the federal government the State may make proper regulations to protect the interests of its citizens, and has failed to properly evaluate the provisions of the Federal Motor Carriers Act which explicitly withdraws from federal regulation [fol. 63] certain classes of motor carriers.

The facts in the Di Santo case differ materially from the facts before the court in the case at bar. As shown by the opinion in the Di Santo case the appellant there was an employee of four steamship companies. True enough he was not on the payrolls of the various lines. He was, however, entrusted with tickets of the various lines, and was authorized by the various lines to make contracts for transportation in their behalf. The only difference between the situation of the appellant there and ordinary agents of such steamship companies was in the method whereby the companies remunerated the persons selling transportation.

The court said in deciding the Di Santo Case:

"A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."

It is noted that the court stated that a statute which directly interferes with Foreign Commerce is a prohibited regulation. So far as we have observed the rule that a state may to some extent regulate interstate commerce in the absence of federal regulation has never been applied to foreign commerce. It becomes apparent that the court in the Di Santo case was considering only the effect of the rule upon foreign commerce. We think this conclusion is inevitable, even though some of the cases cited by the court [fol. 64] upon certain points, or in support of certain statements relate to interstate commerce.

Another point to be considered is the statement of the court that the sales by the broker were as directly related to foreign commerce as were sales made in offices maintained by the various steamship companies. It does not appear from the record in the case before this court that

the person who was going to transport the persons to whom tickets were sold was regularly engaged in the transportation of persons or property in interstate commerce, or that the defendant and appellant was in any degree an employee of the person who would furnish the means of transportation. Certainly there is nothing to indicate that the transaction out of which this prosecution grew was in any manner connected with foreign commerce. The intent of congress to exclude states from exerting their police power in connection with interstate commerce must be clearly manifest to exclude state action.

Napier v. Atlantic Coast Line Railroad Company, 272 U. S. 605, 71 L. ed. 432.

The power of the state to prescribe local regulations which are applicable to articles moving in interstate commerce is aptly pointed out in the various cases involving validity of state pure food laws. See Savage v. Jones, 225 U. S. 501; 56 L. ed. 1182.

As pointed out in the Atlantic Coast Line case, supra, [fol. 65] it is often a question for the courts to decide whether congress intended to occupy the entire field of regulation and thereby exclude the state. We are not confronted with this difficulty in the instant case. As pointed out in briefs heretofore filed, congress expressly excluded from interstate regulation transportation by casual and incidental carriers.

In Townsend v. Yeomans (1937), 301 U. S. 441; 81 L. ed. 1210, the court said:

"The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 S. Ct. 715; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 293, 294, 58 L. ed. 1312, 1318, 1319, 34 S. Ct. 829; Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 279; Carey v. South Dakota, 250 U. S. 118, 122, 63 L. ed. 886, 888, 39 S. Ct. 403; Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 35, 73 L. ed. 161, 167, 49 S. Ct. 69, 62 A. L. R. 805; Atchison, T. & S. F. R. Co. v.

Railroad Commission, 283 U. S. 380, 392, 393, 75 L. ed. 1128, 1136, 1137, 51 S. Ct. 553; Hartford Acci. & Indem. Co. v. [fol. 66] Illinois, 298 U. S. 155, 158, 80 L. ed. 1099, 1101, 56 S. Ct. 685."

We are not unmindful of the fact that the court went on to point out that they found no actual burden upon interstate. However, in view of the statement in the Eicholz case, heretofore cited to the court and discussed in our briefs, that even a direct burden upon interstate commerce is permissible, it can hardly be held that the decision in the Townsend case, supra, was based upon the lack of actual imposition of burdens upon interstate commerce. If such should be the logical conclusion it seems to be reasonable to conclude that the Eicholz case, decided subsequent to the Townsend case had the effect of overruling that part of the Townsend case.

The only thing required of persons coming within the provisions of the Act involved in the instant proceeding is that they secure a license from the railroad commission and provide an adequate bond to protect persons with whom they have dealings.

In Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92, 77 L. ed. 1053, decided subsequent to the Di Santo case the court upheld the right of the states to prohibit interstate movement of vehicles over state highways if the reason for such prohibition was for the protection of public safety. The court pointed out that they had previously held that states may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. The license fee under the Act here involved is of [fol. 67] such an inconsequential amount that it cannot well be said that payment of such fee imposes a burden upon interstate commerce. The only thing actually involved in this case is whether or not the state may require agents to post bonds to insure the fulfillment of their contracts. Attention is directed to the fact that under the provisions of the Federal Motor Carriers Act ticket agents not in the employ of carriers, but acting as brokers, are required to secure permits and post bonds if they sell tickets over lines which are themselves within the regulatory provisions of the Act. In other words, it appears from the face of the Federal Act itself that the requirement of bond for those

engaged in selling transportation as brokers or independent operators is not an unreasonable restriction upon interstate commerce. However, because the federal government expressly excluded occasional incidental and casual carriers from the operation of the federal law, the requirement of bond for those selling transportation as brokers does not apply to the appellant here, and the only existing method whereby the interests of the public may be protected is by state action. We therefore urge that if the transaction involved in the instant case is to be considered as a transaction in interstate commerce, the Act of the legislature here in question does not conflict with the federal law, and that the state, in the interest of protection of the rights of its citizens, has the power to require that those who sell trans-
[fol. 68] portation of persons by motor vehicles operating as occasional, incidental or casual carriers secure a license from the state and post bond for faithful performance of their contracts.

In making the foregoing argument we are not to be understood as abandoning the argument heretofore made to the effect that the transaction involved in the instant case is purely a local transaction, not coming within the inhibitions of interstate regulation by the federal government. No good purpose would be served, however, by burdening the court with a repetition of the argument heretofore presented.

Wherefore, your petitioner respectfully asks that the decision of the court heretofore made in the above entitled action be vacated and set aside, and that the case be again placed upon the calendar of the court for such further consideration as may be right and proper in the premises.

Respectfully submitted, Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney.

[fol. 69] AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013A)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

EDNA VOGT, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years

and is not a party to the within and above entitled action; that affiant's business address is 260 City Hall, Los Angeles, California; That on the 22nd day of October, 1940 affiant served the within Petition for Rehearing on the Attorney for defendant and appellant in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said defendant and appellant, at the office address of said attorney, as follows: Wyman G. Reynolds, Attorney at Law, 1223 Chester Williams Bldg., Los Angeles, California and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Postoffice at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

Edna Vogt.

Subscribed and sworn to before me this 22nd day of October, 1940. Dorothy Simpson, Notary Public in and for the County of Los Angeles, State of California. (Notarial Seal.)

[fol. 70] In Appellate Department of the Superior Court, County of Los Angeles

[Title omitted]

Order Denying Rehearing—Filed October 24, 1940

The petition of respondent for a rehearing after judgment of this court on appeal in the above entitled case having been filed, and having been duly considered,

Said petition is now hereby denied.

Dated October 24, 1940.

By the Court. Shaw, Presiding Judge. Bishop, Judge. Schauer, Judge.

[File endorsement omitted.]

[fol. 71] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

CERTIFICATE OF TRIAL COURT

I hereby certify that I am one of the Judges of the Municipal Court of the City of Los Angeles in the County of Los Angeles, State of California, and that as a Judge of said Court I presided at the trial of the above entitled cause.

I further certify that during the trial of said action, after both sides had rested, the defendant urged as grounds for a judgment of "not guilty" that the statute which the defendant therein, E. W. Thompson, was charged with having violated (Chapter 339, Stats. 1923) was void and unconstitutional for the reasons that (1) it constituted a burden upon interstate commerce in violation of the provisions of the Constitution of the United States, and depended upon Motor Transit Co. vs. Railroad Commisison of California, 15 Fed. Supp. 630, as supporting his contention, and (2) the Congress of the United States has enacted a law governing and regulating the operation of motor carriers engaged in interstate commerce (Motor Carrier Act 1935, Title 49, U. S. C. Secs. 301 to 327), and the State of California is without power to enforce the statute which he was charged with having violated.

[fol. 72]

In reply to defendant's argument, plaintiff, The People of the State of California, by written briefs and by oral argument, urged that the statute in question was a valid regulation under the police power of the state, citing Finn vs. Railroad Commission of California, 2 Fed. Supp. 891, in support of their position; that it did not trench upon the powers of the federal government or conflict with any provisions of the federal constitution, and that the business or acts of the defendant did not come within the purview of the Motor Carrier Act—1935, (Title 49, U. S. C. Secs. 301 to 327). Citing in support of their contention Welch Co. vs. State of New Hampshire, 306 U. S. 79; Eichholz vs. Public Service Comm., 306 U. S. 279, and Sprout vs. City of South Bend, 277 U. S. 163.

Byron J. Walters, Judge. (Seal.)

Attest: Urban F. Emme, Clerk of the Municipal Court, City of Los Angeles, California.

[fol. 73] [Endorsed:] No. 93607. Certificate of Trial Court. Filed Nov. 12, 1940. L. E. Lampton, County Clerk, by J. B. Williams, Deputy.

[fol. 74] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed October 24, 1940

Upon application of the People of the State of California, respondent in the above entitled cause by Ray L. Chesebro, City Attorney, W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, their counsel, for a Stay of Execution of the judgment of the Municipal Court of the City of Los Angeles, in the County of Los Angeles, State of California, made and entered the 16th day of November, 1939, No. 93607, to enable said People of the State of California to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States,

It is Ordered, that the execution and enforcement of said judgment be and it hereby is stayed until the 1st day of February, 1941, to enable said People of the State of California to apply for and obtain a Writ of Certiorari from the [fol. 75] Supreme Court of the United States.

Dated this 24th day of October, 1940.

Hartley Shaw, Presiding Judge, Appellate Department of the Superior Court, County of Los Angeles, State of California.

[fol. 76] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PRAECIPE AND STIPULATION—Filed November 6, 1940

To the Clerk of the above entitled court:

Please prepare and transmit to the Clerk of the Supreme Court of the United States, a transcript of the record upon the Appeal taken by respondent People of the State of California, from the judgment of the Municipal Court of the

City of Los Angeles, in the County of Los Angeles, State of California, No. 93607 therein, and include the following papers:

1. The complaint.
2. The judgment of the Municipal Court.
3. Statement on Appeal.
4. Notice of Appeal.
5. People's Exhibit "A".
6. Defendant's Exhibit "I".
7. Appellant's Points and Authorities filed prior to the original submission of said case on March 28, 1940.
8. Respondent's Points and Authorities filed prior to the [fol. 77] original submission of said case on March 28, 1940.
9. The opinion and the concurring opinion of the court dated June 4, 1940.
10. Respondent's petition for rehearing filed on or about June 10, 1940.
11. The order of the court dated July 3, 1940, granting rehearing.
12. The judgment of the court rendered October 15, 1940.
13. Plaintiff's petition for rehearing filed October 22, 1940.
14. The order of the court dated October 24, 1940, denying petition for rehearing.
15. Statement of the trial court.
16. Copy of order of the presiding judge of the Appellate Department of the Superior Court staying proceedings in said action.
17. This Praecipe and Stipulation.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent.

It is Hereby Stipulated and Agreed, that the Clerk make up the transcript of the record to be filed in the Supreme [fol. 78] Court of the United States, and include in said record all of the pleadings, papers, exhibits and records mentioned in the foregoing praecipe.

It is Further Stipulated and Agreed, that whereas it is necessary to print such record for the use of the Supreme Court of the United States, the Clerk of the Supreme Court is hereby authorized to omit from such printed record all

matters not essential to a consideration of the question presented by the petitioner for a Writ of Certiorari.

Dated this 6 day of November, 1940.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent; Wyman G. Reynolds, Attorney for Appellant.

[fol. 79] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

DOCKET ENTRIES

Aug. 28, 1939. Complaint filed, sworn to by Mrs. George Farley charging the Defendant with having on Jul. 22, 1939 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Viol. Sec. 3 Chap. 390 Stats. 1933. Warrant Issued. $500-Bail set.

Aug. 28, 1939. Cause called. Judge Galbreth presiding. Both parties ready. People represented by Walter C. Allen (D. C. A.). Defendant represented by counsel. Defendant in court, duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant with counsel in open court each personally demands jury trial. Jury trial set for Sep. 11, 1939 at 9:30 A. M. in Div. 7. Bail Set at $200. Defendant Committed.

Sep. 11, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant represented by W. G. Reynolds. Trial by jury waived by consent of plaintiff, and of defendant personally and his counsel in open court. Witnesses [fol. 80] sworn and examined for the People: Mrs. Geo. Farley, Mrs. Belle Aldridge, Edna O'Dell, B. McClure. Witness sworn and examined for the Defendant: E. W. Thompson. Exhibits filed: People's Exhibit "A" (Photo). Defendant's Exhibit #1 (Agreement). Both sides rest.

Sep. 11, 1939. Cause continued to Sep. 15, 1939 at 3 P. M. for further trial.

Sep. 15, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman

(D. C. A.). Defendant in court in Pro. Per. Cause continued to Oct. 16, 1939 at 2 P. M. for further trial.

Oct. 16, 1939. Transferred to Div. 8 for trial.

Oct. 16, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Points and authorities having been filed—Cause continued to Oct. 25, 1939 at 2 P. M. for further trial.

Oct. 25, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. By stipulation and with consent of defendant personally, cause continued to Oct. 30, 1939 at 1:30 P. M. for further proceedings.

Oct. 30, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Cause further argued. Defendant adjudged [fol. 81] guilty of the offense charged. Cause continued for sentence to Nov. 3, 1939 at 2 P. M. Defendant released on his own recognizance.

Nov. 3, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Motion for a new trial denied. Referred to Probation Officer on motion of Court for investigation and report. Continued for probation hearing and sentence to Nov. 16, 1939 at 2 P. M.

Nov. 16, 1939. Transferred to Div. 5 for further proceedings before Judge Walters.

JUDGMENT

Nov. 16, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by E. Leighton (D. C. A.). Defendant in court and represented by Wyman Reynolds. Probation report filed. Probation granted. Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense Violation of Section 3 Chapter 390 Statutes of 1933 the said E. W. Thompson be fined in the sum of 250 dollars and that in default of the payment of said fine on or before 5 o'clock

P. M. of Nov. 16, 1939 the said E. W. Thompson be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied, not exceeding 50 days, and that the defendant be discharged on payment of such portion of said fine as shall not have [fol. 82] been satisfied by imprisonment at the rate above prescribed. It is further ordered, that the execution of sentence be suspended and that the defendant be placed on probation for 1 year subject to the following terms of probation: To report to Probation Officer as directed and to be prohibited from the illegal sale of transportation during period of probation.

Nov. 16, 1939. Written Notice of Appeal filed. Defendant released on his own recognizance.

Nov. 21, 1939. Statement on Appeal filed.

Nov. 27, 1939. Affidavit and Order granting to Dec. 8, 1939 to file respondent's proposed Amendments to Appellant's proposed Statement on Appeal filed.

Dec. 7, 1939. Respondent's proposed Amendments to Appellant's proposed Statement on Appeal and Affidavit of service by mail filed.

Dec. 7, 1939. Hearing to settle Statement on Appeal set for Dec. 18, 1939 at 1:45 P. M. in Div. 5.

Dec. 18, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Settlement of Statement on Appeal submitted.

Mar. 4, 1940. Respondent's proposed Amendments to Appellant's Statement on Appeal are allowed. Appellant to engross Statement.

Mar. 19, 1940. Court's corrected Statement on Appeal filed.

Mar. 21, 1940. Files on Appeal transmitted to Superior Court.

[fol. 83] I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named case.

Urban F. Emme, Clerk of the Municipal Court, of Los Angeles City, in said County and State, by Katherine Christensen, Deputy.

Dated: Nov. 8, 1940.

[fol. 84] CLERK'S CERTIFICATE

I, L. E. Lampton, County Clerk, and ex-officio clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that I have compared the foregoing transcript with the original documents on file herein, in this office, and that the same contain a full, true, and correct copy of the Complaint, Notice of Appeal, Statement on Appeal, Appellant's Points and Authorities filed Mar. 28, 1940, Respondent's Points and Authorities filed Mar. 28, 1940, Memorandum Opinion of Jun. 4, 1940, Respondent's petition for rehearing filed Jun. 10, 1940, Order granting rehearing of Jul. 3, 1940, Memorandum Opinion on Rehearing dated Oct. 15, 1940, Respondent's petition for rehearing filed Oct. 22, 1940, Order denying rehearing dated Oct. 24, 1940, Certificate of Trial Court, Order of the Superior Court staying proceedings, and Praecipe and Stipulation, together with the endorsements on said documents as the same now appear on file in this office.

I further certify that the foregoing copy of the docket record was duly certified and delivered to me by the Clerk of the Municipal Court of the City of Los Angeles.

I further certify that People's Exhibit A (photo) and Defendant's Exhibit 1 (agreement) were never transmitted [fol. 85] to the Appellate Department as part of the record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the Superior Court, this 15th day of November, 1940.

L. E. Lampton, County Clerk, By J. B. Williams, Deputy, Clerk of the Appellate Department. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1941

The petition herein for a writ of certiorari to the Appellate Department of the Superior Court, Los Angeles County, State of California, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.